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# Supreme Court of the United States

October Term, 1947.

No. 371

LOUIS KREIGER,

*Petitioner,*

v.

HELENE KREIGER,

*Respondent.*

**Petition for and Brief in Support of Writ of Certiorari to the Court of Appeals of the State of New York.**

GEORGE S. WING,
JAMES G. PURDY,
ABRAHAM J. NYDICK,
*Counsel for Petitioner.*

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**Petition for Writ of Certiorari to the Court of Appeals of the State of New York.**

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully prays for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York, made July 2, 1947.

## Opinions Below.

The opinion of the Special Term of the Supreme Court of the State of New York on granting the respondent judgment for arrears of alimony appears at Page R. 113 and has not been published officially. No opinion was written by the Appellate Division of the Supreme Court, First Judicial Department, upon affirming the order of the Special Term. Two Justices dissented therefrom in a memorandum opinion which appears at R. 121. No opinion was written by the Court of Appeals upon affirming the judgment of the Appellate Division of the Supreme

Court, but its judgment recites that it did so upon the authority of *Estin* v. *Estin*, 296 N. Y. 308 (R. A-2).

## Jurisdiction.

The remittitur of the Court of Appeals is dated July 2, 1947 (R. A-1), and this petition is presented within three months from the date thereof. Jurisdiction is invoked under Section 237 (B) of the Judicial Code as amended February 13, 1925.

## Questions Presented.

Do the provisions of Art. IV, Section 1, of the United States Constitution require that the State Courts of New York give the same effect to the valid divorce obtained by petitioner in Nevada upon due notice of process served personally on the respondent in New York, and not upon the service of process on the respondent within the jurisdiction of the Nevada Court, and without her personal appearance in that action, as would be given had the respondent been personally served within that jurisdiction or had appeared in that action?

Do the decisions of the State Courts of New York, made before the decision of this Court in *Williams* v. *North Carolina*, 317 U. S. 287, adjudging that the liability of a husband to pay alimony under a separation decree made in a New York Court terminates without qualification when a valid divorce is granted by a Court in any state, fix the New York law as to such liability in and require it to be applied to this case?

These are the same questions as have been presented to this Court in *Estin* v. *Estin*, October 1947 Term, No. 139, and is now awaiting decision by this Court on a petition for a writ of certiorari.

The liability of petitioner to support the infant son of the parties is conceded by him and is not here involved.

## Statement.

On the 9th day of December, 1940, the respondent, then the wife of the petitioner, obtained a judgment of separation in the New York Supreme Court, New York County, after a trial upon the merits, on the ground of the petitioner's failure to support the plaintiff and the issue of their marriage in accordance with his means and station in life. The said decree further awarded the respondent the sum of $60.00 per week for the support of herself and issue of the marriage (R. 62).

In the decision of the Court it was found that one child, Miles Kreiger, was the issue of the marriage and was born on March 28, 1934 (R. 58).

In August, 1944, the petitioner gave up his residence in the State of New York (R. 11, 12) and on the 12th day of September, 1944, acquired a residence in Nevada, purchased residence in Greenville Acre, Washoe County, where he has ever since resided (R. 12).

On December 12, 1944, the petitioner obtained a decree of divorce against the respondent in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe (R. 33), entered upon findings of fact and conclusions of law, in which it was found that the plaintiff and defendant had lived separate and apart for more than three consecutive years immediately preceding the commencement of said action, without co-habitation (R. 32).

The said divorce decree further provided that the petitioner should support, maintain and educate the child of the parties, Miles Monroe Kreiger (R. 32).

The summons had been served upon the respondent personally within the State of New York on the 31st day of October, 1944 (R. 26) and also by mail on the 26th day of October, 1944 (R. 28), but she failed to appear in said action and defaulted therein (R. 79, 80).

In March, 1946, respondent moved at Special Term, Part I of the Supreme Court, New York County, upon an order to show cause dated March 22nd, 1946 for a money judgment in the sum of $3,960.00 representing unpaid alimony alleged to have been due upon the said separation decree pursuant to provisions of Section 1171 B of the New York Civil Practice Act. The petitioner opposed said motion and interposed as a defense the aforesaid decree obtained by him in Nevada. Respondent's motion was granted by an order dated April 22, 1944 (R. 3) and judgment was entered thereon in the office of the Clerk of the County of New York in the sum of $3,960.00 on April 23, 1946 (R. 5).

Upon appeal, the said judgment and order was affirmed by the Appellate Division of the Supreme Court, Second Judicial Department, two Justices dissenting (R. 117), and judgment of affirmance was entered in the office of the Clerk of the County of New York on the 17th day of March, 1947.

An appeal was duly taken to the Court of Appeals of the State of New York by Notice of Appeal dated May 9, 1946 (R. 2).

The said judgment was unanimously affirmed by said Court by its judgment and remittitur made the 2nd day of July, 1947, and the record was duly remitted to the Supreme Court, New York County for enforcement (R. A-1).

The respondent commenced an action in the District Court of the United States for the District of Nevada for a money judgment based upon the aforesaid judgment in the sum of $3,060.00, entered in her favor in the office of the Clerk of the County of New York on December 12th, 1940 (R. 94-96). This petitioner appeared in said action and answered the complaint and at a pre-trial conference in said action, it was stipulated that all sums required to be paid by the judgment of separate maintenance of the Supreme Court of New York, had been paid to and in-

cluding the date of the Nevada divorce decree (R. 107-108); and that the defendant (this petitioner) was then residing in and was a citizen of the State of Nevada (R. 108); that checks at the rate of $50.00 monthly had been tendered and mailed to the plaintiff (this respondent); that return receipts had been received after each mailing and that none of the said checks had been cashed (R. 108). Whether $50.00 per month was a reasonable sum for the support, maintenance and education of the child of the parties was not agreed upon by the parties (R. 109).

The said action brought by the plaintiff was never brought to trial.

## Reasons for Granting the Writ.

1. The record presents a question of nation-wide importance; a question which seemed to have been answered by the decision of this Court in *Esenwein* v. *Commonwealth of Pennsylvania*, 325 U. S. 279, but which the Court of Appeals of the State of New York declined to follow in *Estin* v. *Estin*, 296 N. Y. 308, cited as its authority here, there holding that the earlier decision of this Court made in *Barber* v. *Barber*, 21 Howard (62 U. S.) 582, was more applicable to the facts at bar. The opinion of the Court of Appeals quoted the only paragraph in the opinion in that case relating to the effect of a foreign divorce upon the alimony provisions of a New York separation decree, a statement made with no citation of authority to support it. The Court of Appeals in *Estin* v. *Estin* cited no New York decision in support of or recognizing the authority of the *Barber* decision upon the law of New York.

2. The decisions in New York made prior to the decision in *Williams* v. *North Carolina*, 317 U. S. 287, held that a valid divorce decree ended the right of the woman to collect alimony from her former husband under a pre-existing separation decree and are of the same type as re-

spects the manner in which the divorce was obtained as are the Pennsylvania cases cited by the majority opinion of this Court in *Esenwein* v. *Commonwealth of Pennsylvania* (*supra*) as fixing the law of that Commonwealth.

3. Does the old decision in *Barber v. Barber* (*supra*), made with no citation of authorities, or the recent decision in the *Esenwein* case, correctly state the effect of a divorce decree upon the alimony provisions of a pre-existing separation decree to be applied in this case?

4. The Common Law of New York is that an absolute divorce terminates the liability of a former husband for the support of his divorced wife. In such a case where the Court of Appeals of New York finds that a decree of absolute divorce was validly entered in Nevada in the husband's suit, is New York required under Article IV, Section 1, of the United States Constitution to give full faith and credit to the Nevada decree in applying the Common Law of New York?

5. The confusion which results from the decision of the Court of Appeals in preferring the decision of this Court in the *Barber* case to that of this Court in the *Esenwein* case can only be cleared up by this Court.

WHEREFORE, petitioner prays that a Writ of Certiorari be granted and that the Judgment below be reviewed.

Respectfully submitted,

GEORGE S. WING,
JAMES G. PURDY,
ABRAHAM J. NYDICK,
*Counsel for Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

**The petitioner and respondent were legally divorced in Nevada.** The Court of Appeals of the State of New York in its Opinion in this case obviously so held when it affirmed the judgment for arrears of alimony upon the authority of *Estin* v. *Estin* (*supra*) (R. A2).

*Scheinwald* v. *Scheinwald*, 231 App. Div. 757, 246 N. Y. S. 33;
*Richards* v. *Richards*, 87 Misc. Rep. 134, 149 N. Y. Sup. 1028;
*Solotoff* v. *Solotoff*, 51 N. Y. Sup. 2d 514 (not reported officially).

**No common law power exists in the courts of New York State to compel a man to support an ex-wife; such a right is based on statute alone.**

*Romaine* v. *Chauncey*, 129 N. Y. 566 at 571;
*Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456.

The only statutory provisions in New York for such support are (1) §1155 of the Civil Practice Act when an absolute divorce is granted a wife, (2) §1140-a when an annulment is granted a wife, and (3) §7.5 of the Domestic Relations Law when a husband seeks a divorce based on the incurable insanity of his wife.

**The respondent has no vested right under New York law to the alimony awarded by her separation decree, either as to past due or future installments.**

The citation of *Livingston* v. *Livingston*, 173 N. Y. 377, by the Court of Appeals in its Opinion in *Estin* v. *Estin* to the contrary (*supra*) was clearly a mistake.

When the decree of absolute divorce in that case was made in 1892, no court had any power to modify the alimony provisions thereof. In 1900, the Code of Civil Procedure was amended to permit a court to amend such provisions whether the judgment was "heretofore or hereafter rendered". Hence the Court of Appeals held the wife's right under the decree in that action made in 1892 was a vested one.

When the decree in the instant case was granted, Section 1170 of the Civil Practice Act gave power to the court to modify alimony provisions of a judgment as to both past due and future installments, and this provision has been declared valid by the Court of Appeals.

*Karlin* v. *Karlin*, 280 N. Y. 32, 36;
*Fox* v. *Fox*, 263 N. Y. 68, 70.

*Livingston* v. *Livingston* was cited in the *Karlin* case (p. 36) as being not in point, having concern with a judgment entered before the above amendment.

See:

*Sistare* v. *Sistare*, 218 U. S. 1.

**The Common Law of New York is the same as the law in Pennsylvania, in that the alimony or support provisions of a separation or support decree do not survive a subsequent valid divorce and the decision in Esenwein v. Pennsylvania, 325 U. S. 279, is in point.**

The Pennsylvania cases cited by this Court in *Esenwein* v. *Commonwealth of Pennsylvania*, to wit, *Commonwealth* v. *Parker*, 59 Pa. Superior Ct. 74, and *Commonwealth* v. *Kurniker*, 96 Pa. Superior Ct. 553, consider divorces based on similar facts as to service of process on and appearance by the defendants as those of New York

State cited in the Opinion of the Court of Appeals in its attempt to differentiate this case from the *Esenwein* case.

This Court held in the *Esenwein* case that the effect of a valid divorce decree based upon substituted service of process on a non-resident defendant followed by a default of the defendant in appearing or answering in that action, is the same, so far as it affected the alimony provisions of a prior separation decree, as a divorce decree where the defendant was served personally within the jurisdiction or appeared in the action.

**The Nevada courts have applied the same rule as was recognized by the prevailing opinion of this court in Esenwein v. Commonwealth of Pennsylvania.**

*Herrick* v. *Herrick*, 55 Nev. 59, 68.

**It is the law in New York that the support or alimony provisions of a separation decree are merely incidental thereto. Unless a separation decree is granted the wife, no alimony may be awarded her.**

*Johnson* v. *Johnson*, 206 N. Y. 561;
*Ainsworth* v. *Ainsworth*, 239 App. Div. 258.

**In New York, alimony is not a debt due a wife but general duty of support made specific and measured by the court arising out of the marriage relationship and ends when that relationship ends.**

*Faversham* v. *Faversham*, 161 N. Y. App. Div. 521;
*Romaine* v. *Chauncey*, 129 N. Y. 566;
*Wetmore* v. *Markoe*, 196 U. S. 68.

Under the cases cited, it follows that if the judgment of separation necessary to sustain the support provisions of the judgment is superseded by a decree dissolving the

marriage, the prior alimony or support provisions thereof are also superseded by that decree, as they end with the separation judgment to which they are ancillary and without which they have no validity.

## IN CONCLUSION.

The Courts of the State of New York have failed to give to the divorce decree obtained by petitioner in Nevada the full faith and credit required by Art. IV, Sec. 1, of the United States Constitution, and the Writ of Certiorari should be granted.

Respectfully submitted,

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